No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF THE AMICUS CURIAE*

American Trucking Associations, Inc. (ATA), is the national association of the trucking industry. Its direct membership includes approximately 1,800 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the States. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court.

Many of ATA's members contract with owner-operators—independent businesspersons who own one or more trucks and lease them to motor carriers, and either operate them themselves or supply drivers to do so—to haul freight for them. And in many such arrangements, carriers and owner-operators enter into agreements to arbitrate disputes that may arise during the course of their business relationship. By agreeing to arbitrate, motor carriers and owner-operators alike avoid costly and protracted litigation, instead committing to rely on what both Congress and the courts have repeatedly endorsed as an efficient, fair, and less adversarial means of dispute resolution. And they do so in the expectation that the Federal

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* Both parties have consented to the filing of this brief. See Rule 37.2(a). Pursuant to Rule 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus, its members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Arbitration Act (FAA) will ensure that those commitments are honored. Because the decision below renders those arbitration agreements unenforceable under the FAA, ATA and its members have a strong interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly explained that "[t]he overarching purpose of the FAA ... is to ensure the enforcement of arbitration agreements according to their terms." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 334 (2011). Section 1 of the FAA, however, exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1. That exception means that if motor carriers and their truck driver *employees* include an agreement to arbitrate disputes *in their employment contracts*, they cannot expect those agreements to be enforced under the FAA. See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 119 (2001) ("Section 1 exempts from the FAA only contracts of employment of transportation workers.").

Nevertheless, the FAA plays an important role in other contractual relationships regularly entered into in the trucking industry. In particular, many motor carriers frequently contract with independent businesses to haul freight on their behalf. Often, motor carriers and their independent contractors will agree to arbitrate any disputes that arise between them (including, in some cases, the question whether a given dispute is arbitrable), with the expectation that the FAA will require them to honor those agreements. The decision below upends that expectation.

This case presents two questions, the First Circuit's answer to each of which greatly diminishes the ability of the trucking industry—carriers and operators alike—to take advantage of the Congressional policy favoring arbitration of disputes.

The First Circuit's holding that applicability of the Section 1 exemption is always a question for the court, even when the parties expressly delegate questions of arbitrability to the arbitrator, J.A. 168, would effectively nullify the advantages of arbitration in misclassification disputes—*i.e.*, disputes that turn on whether a given owner-operator is properly classified as an employee or an independent contractor—because in such cases the court's resolution of the gateway question is "so bound up" with the merits of the dispute as to constitute "the entire ball game." *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 87 (2010) (Breyer, J., dissenting). Such a result is incompatible with the strong "federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

But the First Circuit went much further, holding that *even if* the relationship between an owner-operator and a motor carrier is that of a bona fide independent contractor, the Section 1 exemption for transportation-worker "contracts of employment" nevertheless applies. J.A. 185. This sweeping, idiosyncratic holding, if affirmed, would mean that owner-operators and carriers who agree to arbitrate disputes could *never* expect those agreements to be enforced under the FAA—despite the substantial benefits of arbitration to both parties, and their potential to keep down the costs of shipping the materials and goods that are the lifeblood of the national economy. This Court should reverse, and

correct the First Circuit's serious blow to the trucking industry's opportunities to avail itself of the advantages of arbitration under the FAA.

ARGUMENT

I. The Business Relationships Between Motor Carriers and Independent Owner-Operators Are Crucial to the Trucking Industry.

A. In the trucking industry, the use of "owner-operators"—independent businesspersons who contract their services and lease their motor vehicle equipment to trucking companies pursuant to 49 U.S.C. 14102 and related regulations set forth at 49 C.F.R. § 376—is widespread and economically crucial. Their role in trucking operations has a history essentially as long as the industry itself. *See* Ex Parte No. MC 43 (Sub-No. 12), *Leasing Rules Modifications*, 47 Fed. Reg. 53858, 53860 (Nov. 30, 1982) ("Prior to the Motor Carrier Act of 1935, motor carriers regularly performed authorized operations in non-owned vehicles. To a large extent, ownership of these vehicles was vested in the persons who drove them, commonly referred to as owner-operators."). More than sixty years ago, this Court noted the trucking industry's extensive use of leased equipment and drivers supplied by owner-operators. *Am. Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298, 303 (1953) ("Carriers ... have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands.").

Accurate, recent estimates of the number of independent owner-operators are difficult to obtain, but there is no question that they constitute a large segment of the industry. The Owner-Operator Independent Drivers Association—the trade

association representing independent owner-operators and professional drivers—boasts over 160,000 members operating more than 300,000 trucks in the U.S. and Canada. *See* OOIDA: Who We Are, http://www.ooida.com/WhoWeAre. The Census Bureau's 2002 Vehicle Inventory and Use Survey—the most recent comprehensive inventory of trucks nationwide—counted over 545,000 trucks primarily operated by owner-operators. U.S. Census Bureau, *2002 Vehicle Inventory and Use Survey* 15, 39 (Dec. 2004), *available at* http://www.census.gov/prod/ec02/ec02tv-us.pdf. These independent contractors play a crucial role not just in long-haul over-the-road trucking operations, but in every sector of the trucking industry, from moving shipping containers from ports to nearby distribution centers, to nationwide express package delivery.

For trucking companies, independent contractors provide a number of advantages. Independent owner-operators often are mature, experienced drivers, with proven safety records, and highly motivated. The availability of such owner-operators and their equipment enables carriers to save on equipment and capital costs, and provides the flexibility necessary to meet fluctuations in demand for trucking services. As the Court has recognized,

> [d]emand for a motor carrier's services may fluctuate seasonally or day by day. Keeping expensive equipment operating at capacity, and avoiding the waste of resources attendant upon empty backruns and idleness, are necessary and continuing objectives. It is natural, therefore, that a carrier that finds itself short of equipment necessary to meet an immediate demand will seek the use of a vehicle not then

> required by another carrier for its operations, and the latter will be pleased to accommodate. Each is thereby advantaged.

Transamerican Freight Lines, Inc. v. *Brada Miller Freight Sys.*, 423 U.S. 28, 35 (1975). Contracting with independent businesses to supply capacity is, in short, critical to the ability of motor carriers to remain nimble and competitive in the face of inevitable fluctuation in demand for hauling freight.

B. Independent contracting provides significant advantages to owner-operators as well. By successfully and skillfully managing operations, an independent contractor can grow his or her own business, whether by productively performing services him or herself, or by hiring employees to provide additional services. *See, e.g.*, Philip J. Romero, *The Economic Benefits of Preserving Independent Contracting* 30 (Sept. 2011), *available at* http://www.cbrt.org/wp-content/uploads/2012/04/Final-Romero-Report.pdf. Owner-operators who drive their own trucks typically outearn similarly situated employee drivers by a significant margin: as one industry expert stated, "the average owner-operator fares better than company driver counterparts," with a net income of $51,912 compared to "about $40,000 per year for the same amount of work" by an employee driver. Rip Watson, *Owner-Operators Make More Income, Freight-Rate Gains, Industry Expert Says*, Transport Topics, Sept. 23, 2013, at 12.

But independent owner-operators have the opportunity to do far more than simply make more money by personally hauling freight. Because business start-up costs in the trucking industry are comparatively modest—consisting principally of the cost of a tractor and various licensing and insurance

fees—trucking provides independent contractors an affordable opportunity to start their own businesses. Entrepreneurial owner-operators can purchase additional trucks and trailers, and employ drivers and other staff to carry out and expand their business. Independent contracting in the trucking industry allows owner-operators to be their own bosses, and to nurture their own enterprises. In fact, some of today's largest trucking companies—the petitioner here among them—grew from a single-truck operation. *See, e.g.*, Pet. Br. 28; Company History: The C.R. England Story, http://www.crengland.com/company-history.

II. The Decision Below Undermines the Federal Policy Favoring Arbitration, by Depriving Motor Carriers and Independent Owner-Operators of the Benefits of Arbitration Under the FAA.

Petitioner explains in detail why the First Circuit erred in holding that the phrase "contracts of employment" in Section 1 encompasses agreements between motor carriers and independent owner-operators. Pet. Br. 16–29. If affirmed, that holding would broadly eliminate the ability of trucking businesses to rely on arbitration under the FAA.

A. Success in the trucking industry, for carriers and owner-operators alike, presents any number of challenges, with fierce competition resulting in low margins. Unsurprising, then, that carriers and owner-operators aggressively pursue measures that promote efficiency. Like any number of other businesses, trucking businesses frequently agree to arbitrate disputes that may arise between them in the course of their relationship. Motor carriers and independent contractors turn to arbitration because—as Congress

has repeatedly found—arbitration allows parties to avoid the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation of business disputes." Y2K Act of 1999, Pub. L. No. 106-37 § 2(a)(3)(B)(iv), 113 Stat. 185, 186; *see also* H.R. Rep. No. 68-96, at 2 (1924) ("the costliness and delays of litigation ... can be largely eliminated by agreements for arbitration"); H.R. Rep. No. 97-542, at 13 (1982) (arbitration is "cheaper and faster than litigation," has "simpler procedural and evidentiary rules," "minimizes hostility," and is "more flexible in regard to scheduling"). As this Court has put it, in arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

The First Circuit's holding, if affirmed, would ensure that arbitration will be adopted less widely, if at all, in contracts between carriers and independent owner-operators. After all, if the parties to the agreement know that it can be unilaterally repudiated by either party when a dispute arises, they will have little incentive to choose arbitration in the first place. As a result, motor carriers will no longer be able to count on arbitration as a lower-cost, more efficient alternative to litigation as a means of resolving disputes with owner-operators.

B. But motor carriers are not the only losers under the First Circuit's decision: while the plaintiff in *this case* may have concluded that he would fare better in court than in arbitration, for owner-operators faced

with relatively small, individual disputes with a motor carrier, arbitration may well be the only realistic opportunity to vindicate their rights. As the Court has observed, "arbitration's advantages often would seem helpful to individuals ... who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995). Without recourse to arbitration, someone "who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set)" is left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery." *Id.* at 281.

The same would be true of any number of inherently individualized disputes that regularly arise between motor carriers and owner-operators—say, a dispute in which an owner-operator believes the motor carrier has breached their contract by underpaying for a load, to the tune of a few thousand dollars. Such a claim (unless it was low enough to be resolved in small claims court) might be too small for an owner-operator to pursue in a potentially lengthy, expensive lawsuit, even if he or she is confident of ultimately prevailing. But such a dispute might very well be worth pursuing in arbitration, where the reduced procedural and evidentiary burdens mean a party can resolve a claim more efficiently and expeditiously than they could in court—depending on the circumstances, perhaps without the expense of a lawyer at all, "in this much less formal and intimidating forum." Theodore St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 792 (2008).[1]

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[1] In principle, owner-operators would be free to simply adhere to an arbitration agreement when they felt that they

The inevitable result of the First Circuit's approach to the Section 1 exemption, then, will be that any number of meritorious claims that owner-operators might have cost-effectively vindicated in arbitration will instead go unremedied.

C. This disincentive to arbitration is similarly a losing proposition for the shippers and consumers the trucking industry serves. Arbitration permits a business to resolve disputes more cheaply, and those "cost-saving benefits ... are reflected in a lower cost of doing business that in competition are passed along to customers." *Boomer* v. *AT&T Corp.*, 309 F.3d 404, 419 (7th Cir. 2002) (internal quotation marks and citation omitted); *see also* Stephen Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254–255 (2006) (arbitration "lower[s] [businesses'] dispute-resolution costs," and this "benefit to business[] is also a benefit to consumers" because "whatever lowers costs to businesses tends over time to lower prices to consumers"). Given the pervasive role of trucking in delivering the goods on which the nation and its economy depend, this is, cumulatively, no small consideration. *See, e.g.*, American Trucking Associations, *American Trucking Trends* 5 (2017) (in

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could vindicate a particular dispute more readily in arbitration than in court, without recourse to enforcement under the FAA. As a practical matter, however, if carriers and contractors cannot count on their arbitration agreements being enforced *ex ante*, they will be unlikely to enter into them in the first place. And even if they did, what's sauce for the goose is sauce for the gander: the First Circuit's holding would allow motor carriers as well as owner-operators to walk away from their arbitration agreements when a dispute arises, if they saw a tactical advantage in doing so.

2016, transportation by truck represented 79.8% of the nation's primary shipment freight bill, and 70.6% of domestic tonnage).

D. In his opposition to the petition for certiorari, respondent suggests that the First Circuit's expansive construction of the Section 1 exemption will not greatly diminish the use of arbitration in the trucking industry, because "[i]t merely means that state law—rather than federal—applies to their enforcement." Opp. 28. But that assertion ignores the fact that the FAA expresses a strong *federal* policy favoring arbitration—and that especially for an industry whose business is to constantly cross state lines, federal law is the only reliable option.

To be sure, some courts have enforced arbitration agreements between carriers and owner-operators under state law even when they were, in the court's view, exempt under Section 1 of the FAA. *See, e.g.*, *Palcko* v. *Airborne Express, Inc.*, 372 F.3d 588, 596 (3d Cir. 2004) (enforcing arbitration agreement in transportation employment contract under Washington law); *Valdes* v. *Swift Transp. Co.*, 292 F. Supp. 2d 524, 530 (2003) (enforcing arbitration agreement in transportation employment contract under New York law). Other courts, however, have declined to enforce such agreements under state law. *See, e.g.*, *Owner-Operator Indep. Drivers Ass'n* v. *C.R. England, Inc.*, 325 F. Supp. 2d 1252, 1258–59 (D. Utah 2004) (refusing to enforce arbitration agreement in transportation employment contract under Utah law). Thus, neither carriers nor owner-operators could be confident, *ex ante*, that their arbitration agreements will be enforced if their only recourse is to state law.

Moreover, the FAA "creates a body of federal substantive law establishing and regulating the duty

to honor an agreement to arbitration." *Mercury Constr.*, 460 U.S. at 25 n.32. The substance of state arbitration law, by contrast, will vary from jurisdiction to jurisdiction. Thus, even where state arbitration law might not exempt an arbitration agreement altogether simply on the ground that it was a transportation worker "contract of employment," carriers and owner-operators still could not rely on the well-developed *federal* law of arbitration to be confident that the agreement will be enforced according to its terms. *See, e.g., Garrido* v. *Air Liquide Industrial U.S. LP*, 194 Cal. Rptr. 3d 297, 308 (Cal. Ct. App. 2015) (holding that California Arbitration Act applied to agreement that was exempt under Section 1 of FAA, but refusing to enforce because agreement did not provide for class arbitration).

In short, particularly in an industry whose constant movement of goods and people from state to state provides limitless opportunities for forum shopping, the theoretical prospect of enforcing an arbitration agreement under state law amounts is for all practical purposes illusory. If carriers and owner-operators cannot count on the uniformity of the FAA, they will have little incentive to enter into arbitration agreements in the tenuous hope that it will be enforced according to its terms under the law of whatever state a particular dispute happens to land in.

CONCLUSION

The judgment of the Court of Appeals for the First Circuit should be reversed.

Respectfully submitted.

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